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No. 73-1084

IN THE SUPREME COURT

OF THE

UNITED STATES

.....

_____ 197__

WENDELL P. RYNERSON, Petitioner

v.

THE UNITED STATES, Respondent

# APPENDIX

# TO

# PETITION FOR WRITS OF CERTIORARI

# TO THE UNITED STATES COURT OF CLAIMS

.....

Wendell P. Rynerson,
403 E. Second Street,
Madison, Indiana 47250, Petitioner
and Attorney for himself.
812 265 4699

## INDEX OF SUBJECT MATTER AND TABLE OF STATUTES etc. IN APPENDIX


| | | App. |
|---|---|---|
| **United States Constitution's:** | | 1 |
| Article I, Par. 8, | Power of Congress | 1 |
| Art. III, Secs. 1 (1) & 2 (2) | Powers of Courts | 1 |
| Amendment V | Due Process | 1 |
| **United States Statutes:** | | |
| 10 USC 1331, 1332 | Reserve Military Retired Pay | 1,2 |
| 10 USC 1552 | Boards for Correcting Military Records | 2 |
| 28 USC 1346 (a) | District Courts limited to $10,000 judgments on claims against U.S. | 3 |
| 28 USC 1491 | Claims Court jurisdiction | 3 |
| 28 USC 2411 (b) | Interest allowed on District Courts' Judgments against United States | 4 |
| 28 USC 2501 | Statute of Limitations in Court of Claims | 4 |
| 28 USC 2516 | Interest not initially allowed on Court of Claims' Judgments against United States | 4, |
| 50 App. USC 731, 732 | Wartime extension of reserve memberships | 4,5 |
| 66 Stat. 330 | End of World War II was 1952 | 5 |

**United States Court of Claims':**


| | | |
|---|---|---|
| Rule 37 | Effect of failure to deny petition | 5 |
| Rule 38 | Defenses — how presented | 5-7 |


**Adverse Administrative Action:**


| | | |
|---|---|---|
| Army's letter of 20 May 1965 | Denying liability | 7,8 |


**Court of Claims' Actions & Opinions**


| | |
|---|---|
| Judgment-order of 11 November 1971, rejecting First Ground of Rynerson's Claim (ineffectiveness of his discharge), and denying application of Statute of Limitations, and ordering trial on Second Ground of Rynerson's Claim (that his discharge was wrongful) | 8-10 |
| Commissioner's Opinion, 14 Dec. 1972, sustaining wrongfulness of discharge but recommending dismissal for time bar | 10-15 |
| Opinion, Kirby vs US, 11 May 1973, dismissing Kirby's petition as time-barred | 15-34 |
| Judgment-order, dismissing Rynerson vs US, 22 June 1973, relying solely on Kirby vs US | 34,35 |
| Order, 17 Oct. 1973, denying Rynerson's motion for a rehearing as to the judgment-order of 22 June 1973, and denying Rynerson's motion for a trial and-or reconsideration as to the judgment-order of 11 Nov. 1971 insofar as it rejected his first ground of claim, (the ineffectiveness of the 1945 discharge to end his reserve commission) | 35-37 |

## APPENDIX

Article I, United States Constitution:
Section 8. The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court;
United States Code (1964), volume 1, page xliii

ARTICLE III, United States Constitution:
Section 1. (1) The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. . . . US Code, (1964), vol. 1, p. xliv
Section 2 (2). . .the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.
United States Code (1964), volume 1, page xlv

Amendment V of the Constitution of the United States:
No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.
US Code, 1964 Ed — Vol 1, page xlvi

Statutes

10 U.S.C 1331

(a) Except as provided in subsection (c), a person is entitled, upon application, to retire pay computed under section 1401 of this title, if—

(1) he is at least 60 years of age;

(2) he has performed at least 20 years of service computed under section 1332 of this title;

(b) Application for retired pay under this section must be made to the Secretary of the military department, . . . having jurisdiction at the time of application over the armed force in which the applicant is serving or last served.

Volume 2, US Code (1964), page 1222;
70A Stat. 102, Aug. 10, 1956, ch. 1041

10 U.S.C. 1332

1332. Computation of years of service in determining entitlement to retired pay.

(a) (F) or the purpose of determining whether a person is entitled to retired pay under section 1331 of this title, his years of service are computed by adding —

(1) his years of service, before July 1, 1949, in—

(A) the armed forces;

(2) each one-year period, after July 1, 1949, in which he has been credited with at least 50 points on the following basis:

(A) one point for each day of —

(i) active service; or

(ii) full-time service . . .

Volume 2, US Code (1964), page 1223;
70A Stat. 102, Aug. 10, 1956, ch. 1041;
Sep. 2, 1958, Pub. L. 85-861, Sec. 33 (a) (9), 72 Stat. 1565

Title 10, US Code, (1964), Vol. 2, page 1247, Sec 1552 70A Stat. 116, Aug. 10, 1956, Ch. 1041:

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. . . .

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961. . . .

28 United States Code, Vol. 7, pages 5969, 5970, Section 1346 (a): 1964 edition,
The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

(June 25, 1948, ch. 646, 62 Stat. 933; Aug. 30, 1964 (pub. L. 88-519, 78 Stat. 699).

United States Code, 1964 Edition, Volume 7, page 5985:
Title 28, Section 1491, Paragraph 1:

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

June 25, 1948, ch. 646, 62 Stat. 940.
28 USCA 1491 (1973 pocket part)
by amendment of 29 August 1972, 86 Stat. 652:
To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just."
This act shall be applicable to all judicial proceedings pending on or instituted after the date of its enactment.

28 United States Cole, Vol. 7, page 6037, 1964 ed., Section 2411 (b):

Except as otherwise provided in subsection (a) of this section, on all final judgments rendered against the United States in actions instituted under section 1346 of this title, interest shall be computed at the rate of 4 per centum per annum from the date of the judgment up to, but not exceeding, thirty days after the date of approval of any appropriation Act providing for payment of the judgment. (June 25, 1948, ch. 646, 62 Stat. 973; May 24, 1949, ch. 139, Section 120, 63 Stat. 106.)

1964 edition, volume 7, page 6040,
28 United States Code, 2501:

Every claim of which the Court of Claims has Jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues. June 25, 1948, ch. 646, 62 Stat. 976.

28 United States Code, 2516, (1964) page 6043, Volume 7:
(a) Interest on a claim against the United States shall be allowed in a judgment of the Court of Claims only under a contract or Act of Congress expressly providing for payment thereof. (June 25, 1948, ch. 646, 62 Stat. 978.)

Title 50 App. US Code, Supplement V, 1941 — 1946, page 1154, 55 Stat. pages 799, 800:
Section 731: . . . during the existence of any war in which the United States is engaged, and during the six months immediately following the termination of any such war. (Dec. 13, 1941, ch. 571, sec. 1, 55 Stat. 799.)
Section 732: The periods of service, training and service, enlistment, appointment, or commission, of all members of the Army of the United States now or hereafter in or subject to active military service of the United States are extended for the period stated in the preceding section (section 731 of this Appendix): Provided, that

nothing in this section shall be construed to prevent the President from terminating such periods of service, training and service, enlistment, appointment or commission at an earlier date in any case. (Dec. 13, 1941, Ch. 571, Sec 2, 55 Stat. 800.)

A Joint resolution of Congress enacted 3 July 1952, at 66 Stat. 330:

Whereas the last of the states of war of World War II and the national emergencies proclaimed by the President in 1939 and 1941 were terminated on April 28, 1952, . . .

Rules of the United States Court of Claims, loose-leaf, revised September 1, 1969:

Page 14, Rule 37. DEFENSES

(a) Form of Denials: A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. . . . .

(b) Affirmative Defenses: In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. . . .

Page 15,

(c) Effect of Failure To Deny: Averments in a pleading to which a responsibe pleading is required, other than those as to the amount of damages, shall be deemed admitted when not denied in the responsive pleading.

Rule 38. DEFENSES AND OBJECTIONS;

(a) Time for Answer and Reply: . . . .

(b) Defenses; How Presented: Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, or a third-party claim, shall be

asserted in the responsive pleading thereto if one is required, except that the following

page 16

defenses may, at the option of the pleader, be made by motion: (1) lack of jurisdiction of the subject matter or the person, and (2) failure to state a claim upon which relief can be granted. A motion making either of these defenses shall be filed before pleading further if a further pleading is permitted. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and are not excluded by the court, the motion shall be treated as one for summary judgment and shall be disposed of as provided in Rule 101, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 101.

(c) Motion for Judgment on the Pleadings: After the pleadings are closed, any party may move for judgment on the pleadings: Provided, That no such motion may be filed, except by leave of court, after the case has been set for trial. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and are not excluded by the court, the motion shall be treated as one for summary judgment and shall be disposed of as provided in Rule 101, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 101.

(d) Preliminary Hearings: The defenses specifically enumerated (1) and (2) in paragraph (b) of this Rule 38, whether made in a pleading or by motion, and the motion for judgment mentioned in paragraph (c) of this rule shall, on motions of any party, be heard and determined before trial, unless the court orders that the

hearing and determination thereof be deferred until the trial.

Rule 38, continued on page 17:

(e) Motion for More Definite Statement: . . . .

(f) Motion to Strike: Upon motion made by a party before responding to a pleading, or if no responsive pleading is permitted by these rules, upon motion made by a party within 30 days after the service of the pleading upon him, or upon the court's own initiative at any time, the court may order stricken from any pleading any redundant, immaterial, impertinent, or scandalous matter, or any insufficient defense.

(g) Consolidation of Defenses: A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except as provided in paragraph (h) of this rule.

(h) Waiver of Defenses: A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, and the objection of failure to state a legal defense to a claim, may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings; and (2) that whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

HEADQUARTERS, DEPARTMENT OF THE ARMY
OFFICE OF THE ADJUTANT GENERAL
U.S. ARMY ADMINISTRATION CENTER
ST. LOUIS, MISSOURI 63132
(Seal, Dept. of Defense)

IN REPLY REFER TO:
AGAC-SD-T Rynerson, Wendell P.
0 264 252 (11 Mar 65)

20 MAY 1965

Mr. Wendell P. Rynerson
118 12th Street, S. E.
Washington, D. C. 20003
Dear Mr. Rynerson:

I again refer to your application for retired pay benefits.

Title 10, United States Code, Chapter 67, authorizes retired pay for members and former members of Reserve Components who have completed 20 years of qualifying service on attainment of age 60.

Your records show you have completed 17 years, 10 months and 23 days qualifying service. A reply has been received from the National Guard Bureau, which fails to substantiate your claim of qualifying service subsequent to the date of your discharge, 14 October 1945. If you have any evidence in your possession, such as a copy of appointment or orders terminating your appointment and will forward it to this office, further consideration will be given your case.

Since you have not completed the minimum of 20 qualifying years of service, you are not eligible to receive retired pay benefits under the above law.

Sincerely yours,
D.D. Spahr
D. D. SPAHR AD
Colonel, AGC
Commanding

IN THE UNITED STATES COURT OF CLAIMS
No. 57-71

WENDELL P. RYNERSON

v.

THE UNITED STATES

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, Judges.

ORDER

This case comes before the court on defendant's motion filed May 10, 1971, to dismiss the petition and on plaintiff's motion, filed June 9, 1971, for summary judgment, having been submitted to the court on the briefs of the parties and oral argument of counsel for defendant and plaintiff, pro se.

The only claim on which plaintiff sues is for retired pay and that claim, which did not accrue until less than six years prior to the filing of the petition, is not barred by the statute of limitations. See Sauer v. United States, 173 Ct.Cl. 642,354 F.2d 302 (1965); Oceanic Steamship Co. v. United States, 165 Ct.Cl. 217, 218-219 (1964); Nager Electric Co., Inc. v. United States, 177 Ct.Cl. 234, 240, 368 F.2nd 847 (1966).

Plaintiff's contention that his discharge in 1945 merely released him from active duty is rejected; it is clear that the discharge separated him entirely from his reserve commission.

Plaintiff's contention that, in any event, the 1945 discharge was invalid raises triable issues of fact and law which cannot appropriately be decided on the arguments and documents presented on the motion for summary judgment.

IT IS THEREFORE ORDERED that defendant's said motion to dismiss the petition (which motion is based on the ground that the claim is barred by limitations) be and the same is denied.

IT IS FURTHER ORDERED that plaintiff's said motion for summary judgment is denied and the case is

returned to the trial commissioner for trial on further appropriate proceedings.

BY THE COURT
NOV. 11, 1973 Chief Judge

**In the United States Court of Claims**

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No. 57-71

(Filed Dec. 14, 1972)

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WENDELL P. RYNERSON v. THE UNITED STATES

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REPORT OF COMMISSIONER TO THE COURT *

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Wendell P. Rynerson, attorney of record, for plaintiff. Karen A. Berndt, with whom was Assistant Attorney General Harlington Wood, Jr., for defendant.

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OPINION

BERNHARDT, Commissioner: In October 1945, after almost 18 years of military service in the Army

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* The opinion, findings of fact, and recommended conclusion of law are submitted under Rule 134(h).

Reserves, including combat exposure in 5 years of active duty spanning World War II, the plaintiff was honorably discharged in the rank of captain as the result of a reclassification proceeding authorized by AR 650-230. Reclassification is a military euphemism for judicious pruning of unwanted "dead wood." After several futile efforts administratively for restoration, reappointment, or recognition so that he could muster 20 years of covered service to meet the longevity retirement minimum, including two unsuccessful applications to the Army Board for Correction of Military Records in 1957-60, the plaintiff sued here on February 25, 1971, claiming retirement pay from May 1, 1965, he having reached the retirement age of 60 years on April 28, 1965. All of the administrative steps taken by plaintiff were permissive rather than mandatory remedies.

In response to the defendant's motion to dismiss on the grounds that a cause of action accruing in 1945 would be outlawed 6 years later by the statute of limitations (28 U.S.C. X2501), the appellate division of the court on November 11, 1971, denied the motion by order holding that the claim for retired pay accrued in May 1965, less than 6 years prior to the bringing of the petition, and was thus not time-barred. The order in passing rejected plaintiff's contention that his 1945 discharge merely released him from active duty but did not terminate his reserve commission, and returned the case to the trial commissioner to try the issues of fact and law pertaining to the questioned validity of the 1945 discharge.

Defendant filed its answer on February 25, 1972, and an amended answer on March 17, 1972, alleging laches in the latter as an affirmative defense. For certain the court's order of November 11, 1971, did not intend to — nor could it — restrict the issues for either party, except to the extent of rejecting the statutory time-bar defense and the plaintiff's contention that his 1945 discharge separated him only from active duty but not from his reserve commission. Nor could the failure of the

defendant to link its defense of laches to the sister defense of the statute of limitations in the unsuccessful motion to dismiss operate as a waiver of the laches defense.

At a brief trial the testimony of plaintiff and that of his superior officer who had instigated the reclassification in 1945 added nothing of substance to the already available documentary record controlling the issues. As presented by plaintiff these issues relate generally to various procedural irregularities in the reclassification proceeding, and to the arbitrary, capricious and unjust denial in 1957 and 1960 by the Army Board for Correction of Military Records of plaintiff's applications for the correction of his discharge record. Denying these allegations, the defendant pleads affirmatively the defense of laches because the plaintiff's petition was filed on February 25, 1971, some 64 days short of 6 years following the accrual on May 1, 1965, of the cause of action for longevity retirement pay for which plaintiff sues. The laches defense is dispositive and sustained.

No essential difference in principle is observed from the situation in Cason v. United States, 198 Ct. Cl. 650, 461 F. 2d 784, where on June 16, 1972, the court granted defendant's cross-motion for summary judgment and dismissed the petition on a defense of laches [1] There the plaintiff, a former enlisted man in the Navy, waited until the last day of the 6-year statutory period following his involuntary discharge to file his petition for back pay challenging the discharge on procedural grounds. While voicing the orthodox view that the elements of delay and prejudice to the defendant must both be present for application of the laches doctrine, the court adumbrated that where the delay is almost equal to the period for application of the statute of limitations the plaintiff must explain his delay and show that the defendant has

1. Cason is awaiting action by the court on plaintiff's motion for reconsideration argued November 3, 1972.

not been prejudiced.

The delay in the Cason precedent was, if anything, more defensible than in the case under consideration. Between the accrual of Cason's cause of action and the filing of his suit almost 6 years later he applied for review before the Navy Discharge Review Board, to which the claim was subsequently returned by the Secretary of the Navy for reconsideration. In contrast, after learning on May 20, 1965, that he was not eligible to receive retired pay benefits for which he had applied on March 11, 1965, Mr. Rynerson did nothing whatsoever to pursue his claim until he filed his petition here on February 25, 1971.

Cason referred to other military and civilian pay cases in which a lack of diligence and resulting prejudice to the defendant were found where the delay was as little as 11 months. Prejudice to the defendant was found in that had Cason been more prompt in claiming error "the Navy might have been able to clear its records in a new proper proceeding", and that "witnesses may have died, certainly have forgotten some facts of the case, have likely retired from the Service or otherwise become unavailable and documents may have been destroyed." Further, as to the adverse effect of delay on Navy officials: "Their impartiality, competence, or devotion to law are impugned more or less, and they are subjected to some harassment that interrupts their performance of public duty."

A vigorous dissent in Cason failed to see any prejudice to the defendant in the delay, for (as in Rynerson's case) there was no problem of paying two individuals for performing one job, nor any possibility of restoration to the service, nor any question of fading memories since the documentary record controlled the issue of procedural deficiencies without need for testimony. No aspect of the delay by plaintiff, said the dissent, would prejudice the Navy by preventing it from clearing its own records through a new proceeding. Finally, the

dissent expressed the view that Cason had been invalidly discharged and was entitled to recover.

The majority opinion in Cason appears to add teeth to the laches defense in military pay cases, not only by enlarging the definition of prejudice to the defendant, but also by casting on the plaintiff the burden of proving a lack of prejudice to the Government, whereas laches is commonly viewed as an affirmative defense in proof of which the defendant has the laboring oar. In each case the evidence as to prejudice to the Government, or the lack of it, was latent in the documentary record rather than being the subject of demonstration by the parties through anything more than the force of their arguments. However, the fit of the Cason precedent to the Rynerson case is too tight to distinguish, and thus controls.

Despite the disposition of the claim on the basis of laches, the report of facts following this opinion covers all aspects of the issues relating to procedural irregularities in the reclassification and correction board proceedings. Their status is not prejudiced by the passage of time, for they rest on documentary records, and fading memories of witnesses, etc., are no impediment. The reported facts demonstrate rather persuasively the following propositions:

1. The reclassification regulation, AR 650-230, is poorly drawn, confusing, and internally inconsistent.

2. Contrary to plaintiff's contentions, the initiating officer and interviewing officer were duly authorized and empowered to serve in those roles in the plaintiff's reclassification proceeding.

3. The reclassification proceeding deprived plaintiff of basic due process rights with respect to giving him adequate opportunity to learn of the charges against him and to procure statements in his own behalf.

4. The report of interview was perfunctory rather than comprehensive as the regulation required, and the interviewing officer was apparently not aware that he

had an adjudicatory rather than a merely ministerial function.

5. The initiation and interview steps of the procedure were combined to plaintiff's disadvantage.

6. The action of the correction board was not based on substantial evidence in that it failed to account for the fact that, after eliminating review consideration those affidavits of individuals whose recantations were before the correction board, the information remaining adverse to plaintiff was too trivial to justify the harsh action of involuntary discharge of an officer having almost 18 years of credited service.

The defense of laches must be sustained and the petition dismissed.

201 Ct. Cl. 527

**In The United States Court of Claims**
No. 760-71
(Decided May 11, 1973)

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**LINDBERGH KIRBY v. THE UNITED STATES**

---

**David E. Trice**, attorney of record, for plaintiff.

**Steven J. Bercik**, with whom was **Assistant Attorney General Harlington Wood, Jr.**, for defendant.

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Before **Cowen**, Chief Judge, **Davis, Skelton, Nichols, Kashiwa, Kunzig**, and **Bennett, Judges.**

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ON PLAINTIFF'S MOTION AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

**Bennett, Judge**, delivered the opinion of the court:

The plaintiff is a former Air Force master sergeant who on October 12, 1971, brought this suit pursuant to 28 U.S.C. X1491 in an attempt to recover active duty back pay and allowances and retired pay and allowances denied him as a result of an alleged illegal discharge he received from the Air Force on May 2, 1963. The court

concludes with respect to the active duty pay claim that the plaintiff's petition must be dismissed as outside our jurisdiction for having failed to hurdle the threshold issue of the 6-year statute of limitations (28 U.S.C. X2501). With respect to the retired pay claim the petition must likewise be dismissed for failure to state a cause of action upon which relief can be granted. The pertinent facts follow:

The plaintiff first enlisted in the Army in June 1946. He transferred to the Air Force soon thereafter when that branch evolved from the Army Air Corps. Plaintiff served nearly continuous enlistments from June 1946 to May 2, 1963, at which time he received an honorable discharge from the Air Force.[1] Prior to his discharge, the plaintiff had served 16 years, 6 months and 23 days of creditable active duty. At the time of his discharge the plaintiff was in the process of serving a 6-year enlistment that had begun on July 10, 1961. Had he served through the full term of this last enlistment, he would have been eligible for retirement, having credit for more than 20 years of active service.

The discharge plaintiff received in May of 1963 grew out of an incident that occurred on November 21, 1962. On that date the plaintiff was arrested by the civilian authorities in Homestead, Florida, for having committed an undenied act of indecent exposure on the streets of that city. The civilian authorities released the plaintiff to the local Air Force authorities. He was admitted as a patient on November 23, 1962, at the Homestead Air Force Base hospital. On November 27, 1962, he was transferred to the hospital at Eglin Air Force Base for in-patient treatment and psychiatric evaluation. The results of the medical evaluations led to plaintiff's eventual discharge on the grounds of unsuitability, but only after a number of recommendations and opinions were received at discharge board

[1] Plaintiff served through four continuous reenlistments except for a break from June 30, 1950 to October 9, 1950.

proceedings. It is the conduct of these proceedings which the plaintiff alleges violated Air Force regulations and which, therefore, rendered his discharge invalid. The arguments presented by the plaintiff in this regard are challenging, but the court cannot now accept them as dispositive because plaintiff has slept on his rights to challenge the alleged irregularities within the time allowed by the statute of limitations for a judicial test.

Any examination of the applicability of the statute of limitations to a given set of facts should begin with the language of the statute itself. This statute 28 U.S.C. X2501, bars the Court of Claims from taking jurisdiction over a claim "unless the petition thereon is filed within six years after such claim first accrues." In his supplemental brief, the counsel for the plaintiff conceded that the claim for the active duty back pay which the plaintiff should have received if the alleged illegal discharge had not occurred in May of 1963, was clearly barred by the statute of limitations as interpreted by the court in **Mathis v. United States**, 183 Ct. Cl. 145, 391 F. 2d 938 (1968), **aff'd on rehearing**, 190 Ct. Cl. 925, 421 F. 2d 703 (1970). In that case, dealing with a claim for active duty pay, the court held that "the cause of action accrued all at once upon the plaintiff's removal." 183 Ct. Cl. at 147, 391 F. 2d at 939. Thus, the petition filed by the plaintiff in October of 1971 came 8½ years after the plaintiff's discharge in May of 1963.

Following the discharge, plaintiff Kirby eventually applied to the Air Force Discharge Review Board, seeking to have it remove the bar to his future enlistment and to have the board change the nature of his discharge. After a hearing the Discharge Review Board, on September 28, 1967, denied the plaintiff's application. This was followed by an appeal to the Air Force Board for Correction of Military Records, which appeal was denied on January 17, 1968. It is clear that these post-discharge remedies which the plaintiff pursued were permissive in nature and do not serve to toll the running

of the statute of limitations. **Mathis v. United States**, supra, 183 Ct. Cl. at 147, 391 F. 2d at 939; **Kirk v. United States**, 164 Ct. Cl. 738, 742-43 (1964); **Lipp v. United States**, 157 Ct. Cl. 197, 199, 301 F. 2d 674, 675 (1962), cert. denied, 373 U.S. 932 (1963). Plaintiff does not contend otherwise. Therefore, as the plaintiff has conceded with respect to the claim for active duty pay, the petition was filed too late to be considered by the court. The second and more important issue left for the court's consideration is whether the plaintiff's claim for the retirement pay also falls if the claim for active duty pay is barred by 28 U.S.C. X2501. The question may be stated in this way: May plaintiff bring an action for retirement pay more than 6 years subsequent to the date of his final discharge when his entitlement to retirement depends upon invalidating the discharge?

In an affirmative answer to the foregoing question, plaintiff attempts to draw a distinction between the active duty claim and the retirement claim by arguing that if the discharge is found to be illegal as a matter of law, then he should receive constructive credit for the years still to be served under his last 6-year enlistment contract up to July 9, 1967, at which point he could have retired with more than 20 years of active service to his credit. Thus, since July 9, 1967, was the first time he would have been eligible for retirement it is claimed to be also the first time he could have sued for retirement pay and, therefore, is the date upon which his cause of action for retired pay first accrued for statute of limitations purposes. If all of the plaintiff's premises are accepted, it is clear that the petition filed in October of 1971 was timely with respect to the claim for retirement pay. But, note that plaintiff's pyramid of presumptions is based upon voiding the 1963 discharge over 8 years after receiving it.

In an effort to measure the merits of the plaintiff's thesis, attention should first be turned to the general rule found in **Oceanic S.S. Co. v. United States**, 165 Ct.

Cl. 217, 225 (1964), for determining precisely when a cause of action accrues for statute of limitation purposes. There the court held:

> A claim against the United States first accrues on the date when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.....(cites omitted).

At 218 the court said, "....for this court no cause of action accrues before the claimant can bring a suit for money judgment." See also, Nager Elec. Co. v. United States, 177 Ct. Cl. 234, 252, 368 F. 2d 847, 859 (1966). These were contract cases. The same standard applies where the Government's obligation arises as the result of a statute (as in the present case). Sauer v. United States, 173 Ct. Cl. 642, 647, 354 F. 2d 302, 304 (1965).

While it seems clear that plaintiff Kirby could not have sued to receive his retirement benefits in any suit filed prior to the end of enlistment in July 1967 because he did not have 20 years of service, it likewise is clear that if he had successfully brought suit to recover his lost active duty pay within 6 years of his discharge he would automatically have received constructive credit for the time subsequent to his discharge, which would have rounded out the 20 years required for retirement by 10 U.S.C. 8914, and no suit for retirement would have been necessary. Diamond v. United States, 192 Ct. Cl. 502, 427 F.2d 1246 (1970). Gearinger v. United States, 188 Ct. Cl. 512, 412 F. 2d 862 (1969). All events required to fix defendant's liability for the retired pay would thus have taken place within the limitations period. As the matter stands, however, the "all events" requirement to fix defendant's liability has never transpired so plaintiff's cause of action for a money judgment for retirement is nonexistent, having never accrued. It is true that entitlement to active duty back pay and retirement pay arise under different sections of the

Code and accrue as the result of different events. Nonetheless, as noted above, there is a clear nexus between the two. Where the right to the first is demonstrated, the other may follow as a matter of course. It is the precise nature of this connection which requires further analysis.

In pertinent part, 10 U.S.C. 8914 provides: "....a regular enlisted member of the Air Force who has at least 20, but less than 30, years of service computed under section 8925 of this title may, upon his request, be retired." In the past this court has denied a reserve officer the right to retirement benefits under a similar provision (10 U.S.C. 1331) for failing to complete the qualifying 20 years of service. **Montilla v. United States**, 198 Ct. Cl. 48, 457 F. 2d 978 (1972). The same unequivocal rule applies to an Air Force enlisted man under 10 U.S.C 8914. The plaintiff has not served the required length of time to become eligible for the retirement benefits he now seeks. He attempts to avoid this obstacle by asking this court to re-examine and invalidate the May 1963 discharge proceedings in the context of this retirement claim, thereby giving him constructive credit for the years of active duty he did not serve between May 1963 and July 1967. Such a re-examination is clearly barred by the statute of limitations with respect to the active duty claim. As a result, the court does not feel that it has the power to hold otherwise in the context of the retirement claim. The stumbling block comes from the fact that once this plaintiff was officially discharged from the Air Force, he lost the right to earn future active duty pay and, since he had not, at that moment, completed 20 years of service, the future right to receive retirement pay and allowances lapsed as well. The plaintiff had 6 years in which to challenge in court the legality of his discharge in order to protect his right to fulfill his enlistment commitment and obtain the needed years of service for retirement. This he did not do and cannot be allowed to do at this time through the

vehicle of the retirement claim. The one rests on the other like a house on a foundation; without the foundation, the house will not stand.

In reaching this result, the court is not stating a new rule. **Hames v. United States**, 164 Ct. Cl. 746, **cert. denied**, 377 U.S. 904 (1964); **Palmer v. United States**, 129 Ct. Cl. 322, 121 F. Supp. 643 (1954). In **Palmer**, for instance, the court reached a similar conclusion where the plaintiff was seeking to obtain the difference between the retirement pay he would have received had he not allegedly been wrongfully demoted in 1944 from a hazardous duty position more than 6 years prior to filing the suit in 1953. Palmer alleged, as does Kirby, that procedural irregularities made his demotion (which he considered a wrongful discharge) invalid. The demotion to a nonhazardous duty position prevented the plaintiff from serving 20 years in the hazardous duty job, which was a prerequisite to receiving the higher hazardous duty retirement benefits. No back pay was claimed. Palmer retired in 1950. The court dismissed the petition on alternate grounds. First, the petition was filed too late: "Any claim based on that alleged removal (the demotion) is now barred by the six-year statute of limitations, 28 U.S.C .2501 (1952 ed.)....." 129 Ct. Cl. at 326, 121 F. Supp. at 645. The second basis for dismissing the petition rested on the plaintiff's failure to state a cause of action because the pertinent statute in that case required the plaintiff to spend 20 years of actual service in a hazardous duty position. The **Palmer** court treated the two bases for its decision as being completely independent of one another and there they plainly are, nothing in the opinion implying otherwise. However, we need not treat the facts of this case in precisely the same manner. As discussed before, the issue of when the statute of limitations begins to run, and when a plaintiff has stated a sufficient cause of action, may be interrelated, as here. In addition, this plaintiff does not need to show 20 years of actual service in order to qualify for the retirement benefits he now seeks. In

**Gearinger v. United States, supra**, the court held, in a case where the statute of limitations was not an issue, that a serviceman can receive constructive active duty credit as part of a claim for active duty pay, which fulfills the requirements of the retirement statute. Plaintiff Kirby, however, has neither served the necessary 20 years, nor has he received constructive credit therefor. In effect, the plaintiff's right to sue for retirement benefits has never accrued and will not accrue until he actually serves the requisite number of years or receives constructive credit for the same by voiding the discharge in an action for his active duty pay. These opportunities are closed to him by the **Mathis** case as discussed **supra**; thus, the plaintiff has not alleged a cause of action for which relief can by granted.

The language in the opinion in **Sauer v. United States, supra**, does not aid the plaintiff in this case. In **Sauer** the plaintiff, prior to 1944, had been employed by the Federal Bureau of Investigation where he had accumulated 89¼ days of unused annual leave. In 1944, the plaintiff transferred and sought to carry with him credit for the annual leave he had accumulated at the FBI. This request was finally denied him in 1953. The plaintiff did not sue to receive a lump sum amount for this uncredited unused leave until 1964, 3 years after he had retired from Government service. The defendant's primary defense was that the plaintiff's cause of action had accrued in 1944, or at the latest in 1953; therefore, the petition was too late when filed in 1964. In rejecting this position, the court noted that the statute which authorized a lump sum recovery for unused accumulated leave required the employee's separation from service as a prerequisite to making a claim for the money. Thus, it is clear that application of the **Oceanic S.S. Co.** test results in the starting of the statute of limitations on the separation of the employee from Government service since this is the last event required by statute before the claimant would be entitled to bring his suit. In the case at hand, as heretofore noted, the last

event necessary before this plaintiff can sue for his retirement claim has not yet occurred and probably never will — the receipt of credit for 20 years of service.

Nothing that has been said thus far should be read to imply that the court is closing the door to the examination of events that have taken place more than 6 years prior to the filing of the suit. Where the plaintiff can allege a sufficient cause of action at the time the suit is filed, and where the last event necessary to sue has occurred less than 6 years before, the court is perfectly free to examine the operative facts determinative of the issues involved, even if they have taken place more than 6 years before. Neither is the court using the statute of limitations to foreclose the examination of an issue that is part of a larger, single cause of action. With respect to the retirement claim, however, the plaintiff must allege that he has received credit (actual or constructive) for 20 years of service before he has stated a sufficient cause of action. Challenging the validity of the discharge as a means of obtaining constructive service time could only be done as a part of the active duty claim. Once the plaintiff has let that opportunity lapse, he has likewise lost the opportunity to challenge the discharge in the retirement context. Stated another way, when a plaintiff seeks retired pay based on 20 years of service he must be able to show either that he has that service by actually having served it or by having received constructive credit therefor by invalidating a discharge which prevented the required actual service. Plaintiff has done neither, so he states no cause of action for which relief can be granted within our jurisdiction, as heretofore noted. The back pay claim and the retirement claim are not severable under the facts of this case. The first underpins the second. The claim for back active duty pay is admittedly dead, killed by age and the affliction of the statute of limitations. The retirement claim here can exist only if the back pay claim exists so they must be interred together. It would be very strange, indeed, to allow

recovery for the retirement claim and deny it for active duty when both claims depend upon voiding the same discharge.

Once the discharge became effective, the theoretical end of plaintiff's enlistment, which was thereby cut short, is meaningless for purposes of the statute of limitations or for determining when the retirement cause of action accrues. There is nothing harsh in this rule. At the moment a serviceman is discharged under conditions like these, he knows that he has not fulfilled the requirements necessary for retirement. It is incumbent upon him at that point to protect his right to serve further by timely attacking the discharge. He could do this by a suit for active duty back pay, reinstatement, mandamus, or declaratory judgment in an appropriate court. A timely challenge in this manner to the discharge would not accrue a cause of action for a 20-year retirement immediately but would make it foreseeable by protecting the opportunity to earn it, which was not done here.

Prior to enactment of Pub. L. No. 92—415, on August 29, 1972, 86 Stat. 652, plaintiff could have sought declaratory judgment or restoration to his position only in the United States District Court and recovered back pay there for less than $10,000. Said Act, however, gave reinstatement jurisdiction to the Court of Claims "as an incident of and collateral to" a money judgment within its general jurisdiction to enter money judgments under the Tucker Act. This court does not have declaratory judgment jurisdiction except in renegotiation cases pursuant to Pub. L. No. 92—41, 3, 85 Stat. 97, 98 (1971). **Lykes Bros. S.S. Co. v. United States**, 198 Ct. Cl. 312, 459 F. 2d 1393 (1972). The Court of Claims does not otherwise have general equity powers or declaratory judgment authority. **United States v. King**, 395 U.S. 1 (1969). These Acts did not affect the statute of limitations pertinent here. For instance, we cannot restore a discharged Government employee to his job if his claim for back pay is barred by the statute of limitations. Nor can we

enter a declaratory judgment that plaintiff Kirby was wrongfully discharged when the time has elapsed within which we could give him a money judgment for back pay. To do so would be, in effect, reinstating plaintiff to his position for several years for retirement pay purposes, which, for reasons noted above, is beyond our authority. As stated in United States v. King, supra, before this court has jurisdiction it must be for "actual, presently due money damages from the United States." 395 U. S. at 3 Plaintiff's claim for retirement pay does not meet this test, for he has not proved that he has 20 satisfactory years of active service. In fact, he admits that he does not, so he has not alleged a cause of action for retired pay on which relief can be granted. This court cannot supply the years of service, nor waive the requirement, nor award the retired pay without such service, unless the plaintiff has a valid court judgment giving him credit for such service.

In Sauer the plaintiff could have filed an action in mandamus or a declaratory judgment suit at the time it became clear that he was not going to receive credit for the leave he had accumulated at the FBI. The successful conclusion of such a suit in that case would not, however, have accelerated the time for the accrual of his cause of action since it was dependent on separation from the service. More important, the receipt of credit for the accumulated leave was nothing more than a paperwork transaction. There was no doubt at anytime that plaintiff Sauer had actually accrued the unusued annual leave which was the basis for the lump sum claim. The accumulated leave in that case corresponds to the 20 years of service in this case. The court could not have given the plaintiff in Sauer credit for the accumulated leave if he had not actually accumulated it while an employee of the FBI. The situation is the same in the case now before the court. By requiring the plaintiff to challenge his discharge within 6 years of the date it becomes effective, the court is asking the plaintiff to show actual or constructive credit for 20 years of service before he brings the suit and not to seek

to raise himself by his own bootstraps by asking first for constructive credit for the lost years of service and then for retirement pay based on that credit, all in the same lawsuit. As the facts now stand, the plaintiff has not served the 20 years required by the statute for retirement. Until he has served or received constructive credit for such service he has no right to the retirement benefits he now seeks. The oral argument was made that this places a burden on a discharged serviceman who doesn't care to be restored to his position in the service because he is lucky enough to go out and find an equal or higher paying job as in **Palmer**. In such a case he must nevertheless contest the discharge when, in fact, he stands to gain no monetary recovery since he has no damages for lost pay. Under these circumstances, it is said, he should be allowed to sue for retirement pay at the time he would have retired. The short answer to this idea supporting the proposition that a man should be permitted to sue at his convenience, for retirement on the basis of time not served, is that if the serviceman is discharged without having served 20 years, and he is unwilling to protect his right to continue to serve within the reasonable length of time provided by law, then he has no basis for seeking benefits that are supposed to accrue only to those who serve honorably for 20 years. Any other rule than here announced will lead to the filing of stale claims 25 years old, or older, and emasculate the statute of limitations. This is contrary both to law and public policy. **Friedman v. United States**, 159 Ct. Cl. 1, 11, 310 F. 2d 381, 387—88 (1962). Our statute of limitations is jurisdictional and must be strictly construed to avoid prosecution of stale claims which defendant can be prejudiced in contesting because excessive lapse of time dulls memories, accounts for missing witnesses, and occasions periodic, routine destruction of Government records. **Crown Coat Front Co. v. United States**, 386 U.S. 503, 517 (1967; **Feldman v. United States**, 149 Ct. Cl. 22, 32, 181 F. Supp. 393, 400 (1960); **Dawnic S.S. Corp. v. United States**, 90 Ct. Cl. 537, 579 (1940).

In conclusion, the court finds that plaintiff Kirby has, with respect to the active duty pay claim, filed his suit beyond the period allowed by the statute of limitations. With respect to the claim for retirement pay, the plaintiff has not shown the necessary length of service requisite to bringing such a claim and he cannot obtain constructive credit for the missing years of service by challenging an alleged illegal discharge in the context of this claim for retirement benefits, for he waited too long. The plaintiff's motion for summary judgment is denied and the defendant's cross-motion is granted. The petition is dismissed.

Davis, Judge, dissenting in part:

This limitations problem has occasioned much deliberation, and the result is Judge Bennett's admirable opinion for the court, carefully keying the present decision to our prior reported rulings,[1] and explaining its rationale.

I think that the opinion is consistent with the court's earlier holdings in the limitations field (except as indicated in note 1, supra). My understanding of the underpinning of Palmer v. United States, 129 Ct. Cl. 322, 121 F. Supp. 643 (1954), and Hames v. United States, 164 Ct. Cl. 746, cert. denied, 377 U.S. 904 (1964), is that a plaintiff suing for retirement pay (military or civilian) cannot go into the lawfulness of an adverse administrative action (removal or demotion) which accrued more than 6 years before commencement of suit if there is some statute indicating that Congress wanted the retired individual to have actually served the number of years required for retirement, or showing that Congress desired a particular administrative body to decide, on a discretionary basis, whether the plaintiff

[1] I regret that the court does not acknowledge that it is overruling the unpublished order in Rynerson v. United States, No. 57-71, dated November 11, 1971. Though it did not happen to be reported, the Rynerson order, which was unanimous, came after oral argument and consideration by the then full court.

had earned or merited the particular type of retirement. In **Palmer** the court interpreted the "hazardous duty" retirement statute as requiring at least 20 years actual investigative work, and the opinion also indicated (129 Ct. Cl. at 326, 121 F. Supp. at 645) that under that statute the head of the department and the Civil Service Commission had substantial discretion to determine whether the employee deserved that kind of retirement. In **Hames**, there was a statute flatly disallowing credit "for any period of separation from the service in excess of three calendar days", which we interpreted as requiring the Civil Service Commission to leave out of account all periods of removal unless the employee had brought a timely action to set aside the removal as alleged. Rather than being based solely on limitations, both **Palmer** and **Hames** rested on a combination of limitations together with failure to state a claim for relief—i.e., the substantive statute which the Government invoked as a defense prevented the claimant from having a proper claim for retirement pay unless he had timely brought suit to overturn the prior adverse administrative action. Under that rule, the question in each case is whether there is any substantive legislation or regulation (apart from the statue of limitations) which suggests that Congress would want the claimant not to wait until his retirement to test some prior adverse action.

As I see it, **Sauer v. United States**, 173 Ct. Cl. 642, 354 F. 2d 302 (1965), and **Oceanic S. S. v. United States**, 165 Ct. Cl. 217 (1964), are consistent with this **Palmer-Hames** rationale. In **Sauer**, the F.B.I. retirement pay had all been earned before the plaintiff transferred, and the court did not think that there was any statute or regulation (as there was in **Palmer** and **Hames**) implying that **Sauer** had to bring a suit within six years (or earlier) of his transfer to this court (or of the refusal of our Clerk to credit that prior leave) to test the refusal to credit the leave. In **Oceanic** the situation was the same; there was no statute or regulation suggesting or calling

for an earlier inquiry into the disputed substantive issue; on the contrary, the court thought that the applicable regulations were clear that the claimant did not have to sue until after a "final accounting" had been made by the defendant.

Although the court's decision in this case harmonizes with **Palmer-Hames-Sauer-Oceanic**, I depart from it, with some hesitation, because, unlike the majority, I do not see the military retirement statutes in the same light as the "hazardous duty" retirement legislation in **Palmer** or the statutory requirement in **Hames** that creditable service be actually served. I would avoid holding that in the military retirement system Congress has laid down the Procrustean requirement that the 20 years (or more) be actually served in all cases, except where suit is brought within 6 years of the adverse action. Congress did not say explicitly that the service had to be "actual" in all instances, and we have some leeway in inferring an intention to recognize "constructive" service where appropriate.

The hypothetical case which mainly troubles me is that of a serviceman who has been told by an official that he has enough years or points or credits for retirement, and, on the basis of that assurance, does not sue to set aside an early adverse action because he thinks that, apart from that adverse action, he still has enough eligibility for retirement; on retirement he suddenly discovers that the earlier representation was mistaken and that, in order to be eligible at all, he does have to overturn the prior adverse action. Under our recent decisions in **Montilla v. United States**, 198 Ct. Cl. ——, 457 F. 2d 978 (April 1972) and **Parker v. United States**, 198 Ct. Cl. ——, 461 F. 2d 806 (June 1972), the claimant could probably not say that the Government was estopped. If we apply the majority's rule, it is hard to see how an exception could be made for this potential case; limitations is not a doctrine like laches which can

be tailored to fit particular circumstances.[2]

To avoid such possible injustices, it seems to me preferable to hold that the claim for retirement pay does not accrue until retirement, and to rely on the equitable principles of laches — which apply to military pay cases, Cason v. United States, 200 Ct. Cl. ——, 471, F. 2d 1225 (Jan. 1973) — to fend off stale claims and stale issues. A plaintiff who needlessly waited 20 years or so would find himself locked out by laches.

In this particular case, the time-lag was short, and there appears to have been no prejudice to the Government by the delay, and accordingly I would hold laches not to be a bar. On the merits, I would hold for plaintiff but withhold giving my reasons since the court does not reach that issue.[3]

NICHOLS, Judge, dissenting:

I had written an opinion for the court, coming to a conclusion opposite to that of Judge Bennett, as to retirement pay but apparently mine was convincing only in a negative sense. It would be standard procedure to use it as a dissent, or the starting point for one, but I refrain from doing so here. Much of it discusses the reasons why Lindbergh Kirby's discharge was illegal. The court says plaintiff's arguments are "challenging" which is perhaps an understatement, but I am not sure it is proper to publish comments which might have precedential value about the merits of a case the court holds it lacks jurisdiction to decide.

As to the statute of limitations, the court is plainly wrong in asserting it is not stating a new rule, citing Hames v. United States, 164 Ct. Cl. 746, cert. denied, 377

[2] 10 U.S.C. 1331 (d) and 1406 do not apply before October 1966, and, even after that date, do not apply to adverse actions reducing the number of years of creditable service upon which retired pay is computed.

[3] My dissent relates solely to the claim for retirement pay. I agree with the court as to active-duty pay.

U.S. 904 (1964) and Palmer v. United States, 129 Ct. Cl. 322, 121 F. Supp. 643 (1954). Hames is cited just because it cites Palmer. Palmer is the important decision. The court correctly states the facts therein, and correctly summarizes the holdings. It is clear the ground, as to hazardous duty, is a valid reason for the decision. You cannot constructively earn a hazardous duty annuity, but can only do so by performing twenty years of hazardous duty. As the court concedes, however, that rule is not relevant here, because it is possible to earn constructively an annuity of the type plaintiff here lays claim to Palmer's other ground, the statute of limitations, is plainly wrong. The original papers, retrieved for me from the Records Depository, show that Palmer had no money claim rising out of his unlawful demotion. After a brief period, he transferred to another Government agency at his old pre-demotion salary. He applied to the GAO, which paid him all he had lost while the demotion was in effect. He was not out of pocket one cent at that point. The published opinion in Palmer does not indicate the court was unaware of this. In saying that the demotion started our statute (28 U.S.C. — 2501) running, it must have had in mind that Palmer could have sued for a declaratory judgment, or mandamus. In Sauer v. United States, 173 Ct. Cl. 642, 354 F. 2d 302 (1965), obviously a more carefully considered decision, we held that the possibility of seeking remedies outside the Court of Claims, such as declaratory judgment or mandamus, does not start — 2501, the Court of Claims statute, running. Only the availability of a money claim does that. I consider that Sauer overrules the Palmer holding on the statute of limitations, and Palmer should not be cited here unless the court is prepared to reinstate it and overrule Sauer. You can't treat a decision holding one thing and a decision holding the opposite, as both valid and binding authorities. Not only is Palmer bad law, but so is Hames in citing Palmer to dispose summarily of a claim that could have been thrown out for several other reasons.

I would have held that an unlawfully discharged soldier could waive his claim for active duty pay and sue for his annuity when, as here, he would have earned it within his current enlistment, and the right to the annuity accrued less than six years before the suit was brought. If the majority will candidly concede they are fashioning new law, I will likewise concede I would have been if my view had prevailed. The fact is, the problem is one that, except once, we had not faced up to before. I thought that the careful analysis of the consequences of — 2501 in Oceanic S.S. Co. v United States, 165 Ct. Cl. 217, 225 (1964) and in Sauer, supra, pointed the way to my conclusion.

I also believed we had put our foot squarely on that path by reason of an order approved by a unanimous court, holding as stated above, in course of remanding a case for trial before a Commissioner. By some unhappy inadvertence, the order was not abstracted and published in the back of one of our official volumes, as important orders usually are. In the circumstances, I strongly defend the right of the majority herein not to cite or discuss this order, still less to feel bound by it. The citation of unpublished decisions is widely condemned, and justly so in my opinion. Its unfairness is illustrated by this case: Government counsel herein was aware of the order, but Lindbergh Kirby's counsel was not. I mention it, not to refute the majority, but to explain the evolution of my own position. But for it, I would never have had a strong and fixed attitude about the law applicable to this case, and I must now make a conscious effort to remove it from my mind.

Putting Palmer and Anonymous, then, both out of mind, we have an issue that should be approached as res integra. It is understandable for experienced judges to be concerned about stale claims. Despite all that 28 U.S.C. — 2501 can do, and the related, anomalous, but well established doctrine of laches in pay cases, we face many situations where we must inquire into happenings

that are ancient history to many now living. The Government Records Disposal Program creates a constant hazard that facts will have to be found on the basis of documents that once existed but do so no longer. As an example of the problem **Small v. United States**, 200 Ct. Cl.—, 470, F. 2d 1020 (decided December 12, 1972), will serve. Some of our judges thought our oaths required us to investigate matters occurring as far back as 1951 (nineteen years before suit was brought) despite the Government's good faith destruction of all records directly relating thereto. It is understandable to shy away from a construction of 28 U.S.C 2501 which would add another class of such cases to those we already have. Regarding the prevailing opinion as a legislative document, it is carefully considered, thorough, and I would say, irrefutable on its own terms.

My own attitude is, however, that the writing of statutes of limitations, though necessary, is a function of legislatures, not of courts. The Government's consent to be sued is, of course, strictly construed, but we have, I think, endeavored to read 28 U.S.C 2501 in a manner that is fair to claimants too. I think courts should indulge a presumption in favor of their own jurisdiction, and be reluctant to deny anyone his day in court unless lack of jurisdiction is clearly the legislative will. **Cf. Charlson Realty Co. v. United States**, 181 Ct. Cl. 262, 384 F. 2d 434 (1967), as an interesting example of judicial struggle with these principles.

Denial on the basis of subsidiary, judge-made encrustations on the statute is a form of judicial legislation. I would employ laches to defeat claims when the unexcused lapse of time in suing has worked real unfairness to the Government. It may be noted, however, that the records in Lindbergh Kirby's case have survived and his delay in suing has not really hurt anyone but himself.

Thus, even if a legislature which foresaw Kirby's claim would have provided against it, unless his suit was

timely in Judge Bennett's terms, I would not now do the legislature's work. I would hold the plaintiff not barred by 28 U.S.C 2501, and entitled to summary judgment in his favor on the cross motions, with respect to retirement pay only.

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IN THE UNITED STATES COURT OF CLAIMS
No. 57-71

WENDELL P. RYNERSON
v.
THE UNITED STATES

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Before COWEN, Chief Judge, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, Judges.

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ORDER

This case comes before the court on plaintiff's exceptions to the report of the trial commissioner. After considering the briefs of the parties and after hearing oral argument, the court finds that on October 14, 1945, plaintiff was honorably discharged in the rank of captain and at the time of his discharge was credited with 17 years, 10 months, and 23 days of Reserve military service towards retirement; that on February 25, 1971, he filed his suit in this court for retired pay, and that on May 11, 1973, after the filing of the commissioner's report, the court handed down its decision in Lindbergh Kirby v. United States, Docket No. 760-71. Although plaintiff represented himself ably and endeavored to distinguish his case from Kirby on several grounds, the

court has, after carefully reconsidering its decision in the Kirby case, concluded that the cases cannot be distinguished and that the court should adhere to its decision in Kirby.

IT IS THEREFORE ORDERED that plaintiff's petition be and the same is hereby dismissed.

BY THE COURT

JUN 22, 1973 Wilson Cowen

Chief Judge

In The United States Court of Claims

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| 489-54 Harold H. Gearinger, as Executor of the Estate of Royal Barry Shaw<br>259-70 Tom S. Acuna, et al., and four related cases (292-70, 349-70, 458-70 and 203-72)<br>326-70 Mrs. Winston Caldwell, Administratrix, and James J. Shanley<br>461-70 Marvin J. Griggs<br>57-71 Wendell P. Rynerson<br>357-71 Robert H. McKelvy and Maxine McKelvy<br>358-71 R. Hugh McKelvy and Tula E. McKelvy<br>516-71 Koppers-Clough, A Joint Venture<br>554-71 Optimum Designs, Inc.<br>760-71 Lindbergh Kirby<br>App. 9-72 The Sac and Fox Tribe of Indians of Oklahoma, et al.<br>315-72 Cyril K. Chappuis<br>195-73 Athony George Galopin (formerly 257-64) | ) | v.<br>The United States |

Before COWEN, Chief Judge, LARAMORE and DURFEE, Senior Judges, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, Judges, except that Sr. Judge Laramore participated only in No. 489-54, Sr. Judge Durfee participated only in Nos. 489-54 and App. 9-72, Judge Kashiwa did not participate in Nos. 489-54 and App. 9-72, Judge Kunzig did not participate in No. 489-54 and Judge Bennett did not participate in Nos. 489-54 and 544-71.

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**ORDER**

These cases come before the court on motions for rehearing, for new hearing, to vacate the order of the court, for reconsideration, for new trial, for amendment of judgment, for clarification, to reopen case and for further relief under Rules 151 and 152 of the Rules of this court and on consideration thereof,

IT IS ORDERED this 17th day of October, 1973, that said motions be and the same are denied as follows:

489-54 Harold H. Gearinger, as Executor of the Estate of Royal Barry Shaw. Plaintiff's motion for rehearing.

259-70 Tom S. Acuna, et al., and four related cases (292-70, 349-70, 458-70 and 203-72). Plaintiffs' motion for new hearing.

326-70 Mrs. Winston Caldwell, Administratrix, and James J. Shanley. Plaintiffs' motion for rehearing.

461-70 Marvin J. Griggs. Plaintiff's motion to vacate order of the court and petition to reconsider.

57-71 Wendell P. Rynerson. Plaintiff's motion for a rehearing and plaintiff's motion for a trial and-or reconsideration.

357-71 Robert H. McKelvy and Maxine McKelvy

358-71 R. Hugh McKelvy and Tula E. McKelvy. Plaintiffs' motion for amendment of judgment or rehearing.

516-71 Koppers-Clough, A Joint Venture. Defendant's

motion for rehearing or clarification.

554-71 Optimum Designs, Inc. Plaintiff's motion to reopen case No. 554-71.

760-71 Lindbergh Kirby. Plaintiff's motion for reconsideration of court's decision of May 11, 1973.

9-72 The Sac and Fox Tribe of Indians of Oklahoma, et al. Motion of Appellee-cross-appellant (United States) for rehearing to amend order.

315-72 Cyril K. Chappuis. Plaintiff's request for rehearing and for remand.

195-73 Anthony George Galopin (formerly 257-64). Defendant's motion requesting the court to characterize plaintiff's submissions as a Rule 36 petition and to vacate due date for filing answer.

BY THE COURT
Wilson Cowen
Chief Judge

SKELTON, Judge, would allow the motions in Nos. 357-71, 358-71 and App. 9-72.

FILED
OCT. 17, 1973
COURT OF CLAIMS